BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of

ANDREW POSTL
(Claimant-Appellant)

PRECEDENT
BENEFIT DECISION
No. P-B-36
Case No. 67-1957

S.S.A. No.

NORTH AMERICAN AVIATION, INC.
(Employer-Respondent)

The claimant appealed from Referee's Decision No. BK-23475 which held him ineligible for benefits as not unemployed under section 1252 of the Unemployment Insurance Code for two weeks beginning March 28, 1965 and ending April 10, 1965. Both parties presented oral argument.

STATEMENT OF FACTS

From May 1, 1961 through March 26, 1965, the claimant worked for the employer identified above. On the latter date, he was laid off and paid his last regular pay, together with "vacation" pay computed as ten-twelfths of two weeks of regular pay and "sick leave" pay computed as ten-twelfths of one week of regular pay, pursuant to a collective bargaining agreement covering his employment. Apparently the combined gross amount of the "vacation" and "sick leave" payments was $364. He filed a new claim for unemployment benefits on March 29, 1965, effective March 28, 1965.

In his first year of employment the claimant was not eligible for, and did not take, vacation or sick leave. In the employment year beginning May 1, 1962, he took a week of vacation and was absent three days on sick leave. From May 1, 1963 to May 1, 1964, he took no vacation but was absent five days on sick leave. From

May 1, 1964 until layoff on March 26, 1965, he had taken three weeks of vacation around July and three days of sick leave, according to stipulation, although the claimant had testified that he had missed at least six days because of illness in that period. The employer made no payments of vacation or sick leave pay to the claimant at the time of vacation or sick leave.

The pertinent provisions of the applicable collective bargaining agreement are as follows:

"ARTICLE XVIII

VACATION AND SICK LEAVE ALLOWANCE"

* * *

"(d) Anniversary Date.

"An employee's anniversary date shall be the date upon which the employee has completed a year of continuous service since his most recent date of hire or since the date on which the employee last became eligible for vacation and sick leave allowance pursuant to Section 2 or 6 hereof.

"2. VACATION ALLOWANCE.

"(a) Employees completing one year of continuous service, as defined in Section 1(a) hereof, will become eligible for an annual vacation leave of two (2) full calendar weeks for which they will receive vacation allowance equivalent to eighty (80) hours' pay at the employee's basic hourly rate in effect on the employee's anniversary date.

* * *

"3. SCHEDULING OF VACATIONS.

"Vacation leaves will be scheduled and completed in accordance with the following:

"(a) Vacations will be scheduled only after completion of one full year of continuous service. Subsequent vacations may be scheduled only upon completion of each

successive full year of continuous service. No vacation will be granted prior to the eligibility date.

"(b) The employee's Foreman or Department Head will arrange vacations in accordance with the interests of the work requirements of the department and, whenever possible and practical, within a period of thirty (30) days immediately following the date upon which the employee becomes eligible for vacation leave.

"(c) All vacation leaves will be scheduled to begin on a Monday and be completed on a Sunday. Each employee will be given written notice of his approved vacation period prior to its commencement.

"(d) Right to vacation leaves not taken within one year after the most recent anniversary date shall terminate and be waived; provided, that an employee may defer all or a part of his vacation leave for no longer than one year and accumulate up to a maximum of four (4) weeks' vacation leave in any year, which four (4) week vacation leave may be scheduled and taken as one vacation leave, subject to the provisions of Sections 3(a), (b) and (c) above.

"4. SICK LEAVE ALLOWANCE.

"(a) Employees on the hourly payroll completing one year of continuous service, as defined in Section 1(a) hereof, will become eligible for forty (40) hours of sick leave pay computed at the employee's basic hourly rate in effect on the employee's anniversary date. Payment for sick leave allowance shall be made to the employee at the same time vacation allowance is paid.

"(b) Time taken as sick leave shall not be considered as hours or days worked in determining premium pay in any workweek.

"5. PAYMENT OF VACATION AND SICK LEAVE ALLOWANCE.

"(a) Payment for vacation shall be made as soon as practical after the employee's anniversary date.

"(b) An employee who completes a full year of continuous service and who becomes eligible for payment of vacation and sick leave allowance during the time he is on leave of absence, will receive payment as soon as practical after his anniversary date at the basic hourly rate he was receiving at the time he went on leave of absence.

"6. PRORATION OF VACATION AND SICK LEAVE ALLOWANCE.

"(a) Vacation and sick leave allowance will be prorated in the following cases: death, layoff in accordance with the provisions of Article XI, termination because of inability to meet Company medical standards, entry into active duty with the Armed Forces in accordance with the provisions of Article XV, medical leaves of absence in excess of six (6) months when requested in writing by the employee and early or normal retirement in accordance with the provisions of the Hourly Employees Retirement Plan and retirement because of total and permanent disability in accordance with the provisions of such plan.

"(b) For all employees who have not completed twelve (12) or more years of uninterrupted service or fifteen (15) or more years of accumulated service, payment of such prorated vacation and sick leave allowance shall be on the basis of ten (10) hours at the employee's current basic hourly rate (except as provided in Section 6(e) below) for each full month of service since his last anniversary date."

The Department of Employment established the claimant's maximum weekly benefit amount at $55 and issued a determination holding him ineligible for unemployment benefits for three weeks beginning March 28, 1965, under section 1252 of the code, on the ground that he had received 100 hours of pro rata vacation pay and pro rata sick leave pay constituting wages allocable to the period following termination of employment.

The claimant appealed to a referee in Case No. BK-20615. The referee's decision affirmed the departmental determination. In Case No. 65-2478 this board set aside the referee's decision because of lack of notice to the employer in the prior proceedings. The present appeal is from a further referee's hearing which both parties attended.

The appeal to the referee is dated as signed on April 12, 1965 and postmarked April 13, 1965. The determination is dated as issued April 14, 1965. The record contains no direct explanation of this sequence of events, although it appears that telephone calls and other conversations occurred between the department and the parties before the written determination issued.

REASONS FOR DECISION

Before proceeding to the substantive issues in this appeal, we must have jurisdiction.

Section 1328 of the California Unemployment Insurance Code provides:

> "1328. The facts submitted by an employer pursuant to Section 1327 shall be considered and a determination made as to the claimant's eligibility for benefits. The claimant and any employer who prior to the determination has submitted any facts or given any notice pursuant to Section 1327 and authorized regulations shall be promptly notified of the determination and the reasons therefor and may appeal therefrom to a referee within 10 days from mailing or personal service of notice of the determination. The 10-day period may be extended for good cause. The director shall be an interested party to all appeals."

A referee is without jurisdiction to decide an appeal on its merits unless the appeal complies with these statutory requirements. This view has been upheld by a court of competent jurisdiction. In Henderson v. Rollison (1962), San Diego Superior Court Case No. A-4, it was held that failure to exercise the appeal right within the time allowed was a jurisdictional defect. This board has jurisdiction only over

appeals properly brought before a referee (section 1336 of the code).

Of course, an appeal would not normally be intended, when filed, to be from a determination which did not yet exist. It is reasonable to infer, however, where an appeal is filed shortly before the written notice of determination is issued, that the appeal arises from some cause of dissatisfaction, and that this cause of dissatisfaction was an oral determination, later reduced to writing. Appeals from oral determinations or from simple refusals to pay benefits are permissible, for otherwise the right of appeal could be defeated by mere administrative failure to issue a written determination, or the legislative intent of prompt action (section 1326 of the code) could be defeated by unnecessary delay.

The time in which to appeal an oral determination does not begin to run until the written notice of it is issued, so we need not be concerned about the date of the oral determination.

To regard the later issuance of the written determination as requiring a separate appeal in addition to the appeal from the inferred oral determination on the same issue would be unduly technical and serve no valuable purpose. It is contrary to sound public policy for adjudicative agencies, and particularly modern administrative agencies applying complex law to laymen unassisted by private counsel, to avoid decisions on the merits of matters before them by relying on excessively narrow procedural technicalities. We therefore conclude that a proper appeal has been filed, and we have jurisdiction to decide the merits of the present case.

Unemployment compensation benefits are payable only to unemployed individuals (section 1251 of the Unemployment Insurance Code).

Section 1252 of the code defines an unemployed individual as follows:

> "1252. An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable

> to him, or in any week of less than full-time work if the wages payable to him with respect to that week are less than his weekly benefit amount. . . ."

We shall first consider whether that portion of the payment the claimant received upon layoff, which has been designated as vacation pay, constitutes wages payable with respect to the week or weeks immediately following the layoff. In our opinion the decision of the court in Jones v. California Employment Stabilization Commission (1953), 120 Cal. App. 2d 770, 262 P. 2d 91, is controlling.

In Jones, the District Court of Appeals considered a claimant's eligibility for benefits who received vacation pay upon termination of his employment due to lack of work. The vacation payment was made in accordance with the provisions of a collective bargaining agreement substantially similar to Article XVIII, Section 6, of the agreement now before us. The court held that the vacation payment was wages paid with respect to the period commencing with the date following termination of the claimant's employment and continuing until his vacation pay was used up at his current hourly wage; that the claimant was not unemployed and therefore was ineligible for benefits during this period. In reaching this conclusion the court stated:

> " . . . the agreement does not give an employee who is laid off because of lack of work any option relative to vacation or vacation pay. It simply provides that he shall be given pro rata 'vacation pay' computed as of the date of termination in the same manner as annual vacation pay. So, one who is laid off does not lose the vacation benefits which have been accumulating since the last computation date and which he was not entitled to collect as he went along. The future and contingent character of such benefits is here further emphasized by the fact that an employee who quits or who is discharged for cause does not receive such pay. The pro rata vacation pay which petitioner received was earned in the same way that annual vacation pay was earned. It has the same characteristics. The parties have designated it also as 'vacation pay.'

> They must have meant it was for vacation. But petitioner could not realize upon his vacation pay while he was earning it, nor could he then take time off. He could only come into the realization of this benefit upon the happening of the specific condition, viz., that his services were terminated 'through no fault or desire of his own.' He was then entitled to the money he had earned for his vacation which started immediately and continued until his vacation pay had been used up at his current hourly wage. . . ."

While the agreement here in question does give the employee an option to defer the taking of a vacation for one year and thereby accumulate up to a maximum of four (4) weeks' vacation leave in any one year, or to not take a vacation at all and still receive vacation pay, it does not give an employee who is laid off because of lack of work any option relative to vacation or vacation pay. It simply provides that he shall be given pro rata "vacation pay" computed as of the date of layoff or termination in accordance with section 6(b) or (c) of the agreement. For such reason we must hold the vacation payment made to the claimant was payable with respect to the weeks commencing March 28 and April 4, 1965. Since the amount of pay exceeded the claimant's weekly benefit amount for each of those weeks, he was ineligible for benefits during that time under section 1251 of the code, not being "unemployed" as defined in section 1252 of the code.

Our next consideration relates to the Sick-Leave Allowance paid to the claimant under the provisions of Article XVIII, Section 6, of the agreement.

An analysis of the nature and treatment of the sick leave allowances provided for in the agreement must begin by elimination of the fiction that they constitute a "bonus" given by the employer as a gift or gratuity for some forbearance by an employee during his employment. The collective bargaining agreement provides that, once laid off, an employee must take his sick leave or vacation allowance computed pro rata since his last anniversary date. Payment for sick leave is to be made at the same time and at a similarly computed rate as vacation pay except for a difference in ratio of hours earned to months of service. Both are prorated to the date the employee's services are terminated.

Thus both sick leave and vacation allowances become vested at that time, and not before. Being vested, both must be considered as wages - not a "bonus." For only where an employee has no vested right to allowances upon his involuntary termination of employment can they be considered something other than wages (27 Ops. Cal. Atty. Gen. 71; 28 Ops. Cal. Atty. Gen. 40). Seen in this light, the term "bonus" may be more precisely defined as a "premium or extra or irregular remuneration in consideration of offices performed or to encourage their performance," or "an extra consideration given for what is received or something given in addition to what is ordinarily received by, or strictly due, the recipient." (Black's Law Dictionary, 4th ed.)

With respect to the allocation of sick leave allowances, the collective bargaining agreement provides, in the same manner as allowances for vacation, that an employee may "realize" or draw upon accrued benefits earlier earned once his anniversary date passes. Payment of these allowances is prospective. The entire pattern for their payment looks to the future. They are earned during one period and received during a later period. Upon the authority of Jones v. California Employment Stabilization Commission, supra, these allowances, whether for sick leave or vacation, must be characterized as wages "with respect to" the later period. The parties obviously did not intend that the payments be allocated to an earlier period when the services were rendered (see also Shand v. California Employment Stabilization Commission (1954), 124 Cal. App. 2d 54, 268 P. 2d 193).

This rationale finds support in legislative intent. That a claimant should not receive dual or duplicate payments is so firmly rooted in California unemployment insurance law as to require no lengthy citation of judicial authority. However, the District Court of Appeals in Jones, 120 Cal. App. 2d at 777, stated:

> "As pointed out in Chrysler Corp. v. California Emp. Stab. Com., 116 Cal. 2d 8, 16 . . . the fundamental purpose of unemployment insurance is to cushion the impact of such impersonal industrial blights as seasonal, cyclical and technological idleness, and thus to provide benefits to workers coming within the provisions of the act for unemployment not occasioned with their consent

> or brought about by their fault. The payment, however, of unemployment benefits to a worker for a period of vacation with pay would not fulfill the purpose of the act."

This principle was further articulated by the California Supreme Court in Bradshaw v. California Employment Stabilization Commission (1956), 46 Cal. 2d 608, 611:

> "The policy against duplication of payments should not be thwarted by any so-called liberal construction of the act, especially when such construction is not justified by the language of the contract. Unemployment insurance was not intended to protect employees already protected for the same period by their private contracts." (Emphasis supplied)

This language is manifestly appropriate when applied to sick leave allowances. Moreover, there should be placed squarely upon the claimant "who claims what appear to be duplicating payments /the obligation/ to show that there is no duplication." (Bradshaw, supra, 46 Cal. 2d at 611). The claimants in Bradshaw had relied solely upon the language of their contract, as must the claimants in the instant case, and it alone was found to be insufficient to establish that dismissal pay was paid "with respect to" the period prior to the termination of employment. The analogy is apt. We hold in the instant case that the sick leave allowances were properly allocable to the period following the claimant's termination of employment.

We specifically distinguish in so holding Benefit Decision No. 6376, a case which dealt with earned or accrued as opposed to pro rata sick pay.

In Benefit Decision No. 6376 the employment contract provided for a monthly accrual of sick leave which accumulated to the employee's credit. Any unused sick leave pay was paid to the worker annually after a computation date. Under such circumstances of vesting, the payment was a bonus for failure to be absent due to illness,

paid for the period in which the worker would have been entitled to receive the equivalent sick leave pay if illness had occasioned his loss of work.

Aside from identifying the purpose for which payments are to be made, the parties cannot by their contract control the unemployment insurance effect of such payments - neither separately nor by agreement can the parties determine directly that unemployment insurance benefits will or will not be paid for any particular period or that the wages paid will be allocated to any period other than that for which they were paid (see Unemployment Insurance Code section 1342; Shand v. California Employment Stabilization Commission, supra; Pacific Maritime Association v. California Unemployment Insurance Appeals Board (1965), 23 Cal. App. 2d 325, 45 Cal. Rptr. 892; Douglas Aircraft Company v. California Unemployment Insurance Appeals Board (1960), 180 Cal. App. 2d 636, 4 Cal. Rptr. 723). Attempted allocations by parties were rejected in Benefit Decisions Nos. 5789, 6014, 6263, 6303, 6376, 6756, 6779 and 6806.

As to the claimant's contention that the sick leave payments should be regarded as supplemental unemployment benefits within the scope of section 1265 of the Unemployment Insurance Code, it is significant that Article XXIV of the collective bargaining agreement speaks in terms of "Extended Layoff Benefits." Section 2 of the article states that the benefits provided are to help pay living expenses by "supplementing and not replacing unemployment compensation." In view of this provision in the contract, it would appear that the claimant's contention that the payments involved herein should be regarded as supplementary unemployment benefits is without merit.

DECISION

The referee's decision is modified. The claimant is ineligible for benefits under sections 1251, 1252 and 1279 of the code for the three weeks beginning March 28, 1965 and ending April 17, 1965.

Sacramento, California, March 4, 1969.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING IN PART - Separate Opinion Attached

LOWELL NELSON

DON BLEWETT

SEPARATE OPINION

CONCURRING IN PART - DISSENTING IN PART

We concur as to that portion of the majority decision which holds that the pro rata vacation pay involved is wages allocable to the period following termination of employment and that during such period the claimant was not "unemployed" as defined in section 1252 of the code. We take this position because we agree with the majority that the decision of the court in Jones v. California Employment Stabilization Commission (1953), 120 Cal. App. 2d 770, 262 P. 2d 91, is controlling.

We disagree with that portion of the decision, however, which holds that the Sick Leave Allowance under Article XVIII, section 6, of the Agreement is also properly allocable to the period following the claimant's termination of employment. We do not believe that the majority's attempted distinction between "bonuses" and "wages" is valid. Although the majority points out that the sick leave allowance "must be considered as wages - not a 'bonus'," section 926 of the code specifically includes "bonuses" within the definition of "wages." This is really not the question. The question is one of allocation.

The majority seeks to apply the Jones case to sick leave pay. However, we believe that a distinction exists and should be made.

In Jones, the court continually emphasized that vacation pay "is a term of common usage that is generally understood." It means, "pay for a vacation. . . . . The parties have designated it also as 'vacation pay.' They must have meant it was for vacation."

Similarly here the parties have designated a portion of the payment made to the claimant as "sick leave allowance." They must have meant it was pay for being absent from work because of illness. However, once the employment relationship

ended there can be no sick leave. As the employer's representative has so cogently pointed out, the effect of the Jones case is to say to the worker who is dismissed, "Here is your vacation pay, take your vacation now." But the employer can hardly say, "Here is your sick leave pay, go get sick."

So we must look to the purpose for which the payment was made in order to determine its allocation.

In the present case, the payment was designated as sick leave allowance only to identify it. If the claimant had continued to work past the next computation date, he would have received a full week's sick leave allowance. Then, if during the ensuing year the claimant was not sick, a question would arise as to the nature of the payment. However, if he had been off for illness during the ensuing year, that payment would have been true sick leave pay allocable to the period of illness (Barrett v. California Unemployment Insurance Appeals Board (1961), 190 Cal. App. 2d 854, 12 Cal. Rptr. 356). This appears to be the fundamental purpose for the payment, but here the claimant's termination of employment has frustrated that purpose. The payment was made not because the claimant was ill but because the employer-employee relationship had ended. The termination of employment had made it impossible for the claimant to continue as a potential beneficiary under the plan.

Sick leave pay protects the worker against short-term illnesses. Unemployment insurance protects him when he is unemployed and able to work and disability insurance protects him when he is disabled for each spell of disability after a week's waiting period. It is also to be noted that an individual cannot draw unemployment insurance during any week if he is sick and unable to work for even one working day of that week. Further, if the claimant again became employed under a similar contract, he would not immediately qualify for sick leave pay although he could become ill and in need of such payments. Therefore, to allocate the sick leave allowance to the period immediately following the termination of employment would be to deprive the claimant of one of the benefits of his contract of employment, and to leave him unprotected should illness befall him in the future.

In our opinion the payment of the claimant's sick leave allowance under these circumstances should be allocated to the period earned. It was paid for the work done since the last previous computation date and with respect to the period in which that work was done within the meaning of section 1252 of the Unemployment Insurance Code. It follows that such payment did not affect the claimant's eligibility for benefits after Saturday, March 27, 1965.

Further, in holding the sick leave allowance to be allocable to the period following termination of employment the majority relies quite heavily on what it calls the legislative intent that a claimant should not receive dual or duplicate payments of wages and unemployment insurance, citing as authority Bradshaw v. California Employment Stabilization Commission (1956), 46 Cal. 2d 608, 611. Since the Bradshaw case the California Supreme Court has had occasion to review such intent and it held that the declared legislative policy to discourage the duplication of payments upon which the Bradshaw case rested has been set aside by the enactment of section 1265 of the Unemployment Insurance Code (Powell v. California Department of Employment (1965), 45 Cal. Rptr. 136).

This leads us to believe that the claimant's contention that under section 1265 of the code sick leave allowances paid upon termination of employment should not be construed as wages, cannot be lightly dismissed. In the Powell case the individuals concerned received a sum of money designated as either "severance pay" or "dismissal pay" payable under the terms of the collective bargaining agreement. Apparently, the only way an individual could receive this pay was to be terminated by the employer. The court there held that the provisions of section 1265 of the code were so broad as to include severance or dismissal pay and that the label attached to such payments was not controlling. More than three years have passed since the Powell case and the legislature has not seen fit to amend section 1265. It would thus appear that since the sick leave allowance in question could not be paid for the purpose intended, being sick and unable to work for the employer, it must then have been intended as some sort of severance pay. That is, this was a payment for work already performed under the contract of employment

which no longer could be paid for its primary purpose since the employment relationship had ended. It may be then that this sick leave allowance falls within the purview of the Powell case.

It is interesting to note that not one of the parties to this case (the employer, the claimant or the department) has contended that the sick leave allowance should be allocated as the majority is now doing. Up to this point it has been a long standing administrative practice, challenged by no one, that sick leave allowances should be allocated to the period prior to the termination of employment. We can see no valid reason for overturning this administrative practice.

In light of the foregoing, we cannot agree with our colleagues and we instead would hold that the sick leave allowance in question does not affect the claimant's eligibility for benefits after Saturday, March 27, 1965.

LOWELL NELSON

DON BLEWETT